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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 277

IN RE CARTER

BOLITHA J. LAWS, CHIEF JUDGE, AND F. DICKINSON LETTS, JAMES W. MORRIS, DAVID A. PINE, MATTHEW F. McGUIRE, HENRY A. SCHWEINHAUT, ALEXANDER HOLTZOFF, RICHMOND B. KEECH, EDWARD M. CURRAN, EDWARD A. TAMM, BURNITA SHELTON MATTHEWS, CHARLES F. McLAUGHLIN, JAMES R. KIRKLAND, AND WALTER M. BASTIAN, DISTRICT JUDGES, COMPRISING THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, *Petitioners*

v.

JOHN W. CARTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States District Court for the District of Columbia and the judges thereof, prays that a writ of certiorari issue to review the judgment of the United

States Court of Appeals for the District of Columbia Circuit, entered in the above case on July 20, 1951, and the preliminary order entered on March 30, 1951.

OPINIONS BELOW

Neither the majority and dissenting opinions of the Court of Appeals on the original hearing (R. 20-35) nor the opinions on the rehearing *in banc* (R. 43-50) have been reported as yet.

JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1951 (R. 50). A preliminary procedural order, involved in this case, was entered on March 30, 1951 (R. 41). By order of Mr. Chief Justice Vinson, dated June 20, 1951, time for filing a petition for a writ of certiorari from the order of March 30, 1951, was extended to and including August 27, 1951 (R. 53).[1] The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254(1).

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[1] Petitioners are of the view that a petition which is timely as to the judgment of July 20, 1951, is also timely as to the preliminary procedural order of March 30, 1951, but as a precautionary measure, and in order to obviate any objection on the ground of timeliness to presentation of issues involving the judgment of July 20, 1951, and the procedural issues involving the orders of March 30, 1951, in the same petition, application was made for the extension of time which was granted by the Chief Justice. See R. 51-53.

QUESTIONS PRESENTED

In 1947, respondent was granted a two-year authorization by the District Court for the District of Columbia, under the District of Columbia bondsman statute, to engage in the bonding-business in criminal cases in that court. Upon expiration of his authorization in 1949, he applied for renewal. The District Court denied the renewal application, without a hearing and on the basis of information available to it, on the ground that respondent was not qualified to be a bondsman. Respondent took a direct *ex parte* appeal to the Court of Appeals, which, after refusing to permit a hearing on behalf of, or any participation by, the District Court in the appellate proceedings, reversed the District Court's order—in the first instance by a majority of a three-judge court, and again, *in banc,* by a vote of 4 to 3, the majority failing to agree on the reasons therefor. The questions presented are:

1. Whether the District Court acted within its authority in denying respondent's application for renewal of his two-year authorization to engage in the bonding-business in that court.

2. Whether the District Court's order denying respondent's application for renewal of his two-year authorization to engage in the bonding-business in that court is appealable to the Court of Appeals.

3. Whether the Court of Appeals properly refused the District Court any right to participate or be heard in the appellate proceedings.

STATUTES AND RULES INVOLVED

The pertinent statutes and bonding business rules of the District Court are set forth in the Appendix, *infra,* pp. 30-32.

STATEMENT

The District of Columbia bondsman statute (Act of March 3, 1933, 47 Stat. 1482, c. 206, D. C. Code, Title 23, c. 6) requires all persons seeking to engage in the bonding-business in the criminal courts in the District of Columbia to secure special authorization from each of the courts in which they seek to carry on such business.[2] Rules and regulations providing the qualifications of bondsmen, and the terms and conditions upon which the bonding-business is to be carried on, are to be adopted by each court. The criminal division of the United States District Court for the District of Columbia is designated to make orders approving such applications and to grant such authority in that court, taking into consideration, under the statute and the court rule, "both the financial responsibility and the moral qualities of the person so applying" (Section 8). Authority to act as bondsman is renewable from time to time as the court may provide (Sec-

[2] See *infra,* pp. 30-31.

tion 8); the District Court rules make the authorization renewable every two years. *Infra,* pp. 31-32.

On November 17, 1947, respondent John W. Carter filed an application with the District Court under this statute to engage in the bonding-business in criminal cases in that court. The application was approved by the court—acting through Judge Pine —on November 18, 1947. The history of the District Court's attempt to revoke that approval—prior to the expiration of the two-year period covered by the authorization—is set forth in *In re Carter,* 177 F. 2d 75, certiorari denied, 338 U. S. 900, which held the District Court's attempted revocation and withdrawal, within the two-year period, to be improper. See Petition for a Writ of Certiorari, No. 422, October Term, 1949.

On November 17, 1949, respondent filed his application for *renewal* of his authorization to act as a bondsman in the District Court (R. 1-3), pursuant to Rule III of the Rules of the District Court concerning bonding-business authorizations, which provides for such a renewal application, in the same form and with the same information as the initial application, "on the anniversary of the Court's approval of the original application," and also requires that the renewal application must "receive the approval of a Justice of the Court before the bondsman shall be entitled to continue to appear as surety on bonds or recognizances in this court" (R. 4; see *infra,* pp. 31-32). The re-

newal application was denied by Judge Holtzoff on December 13, 1949, "on the ground that in the opinion of the Court he lacks the qualifications for a bondsman" (R. 3). A petition for reconsideration (R. 3-11) was denied on January 3, 1950 (R. 12).

On January 6, 1950, respondent filed a notice of appeal from the District Court's order of December 13, 1949, and from the denial of the application for rehearing entered January 3, 1950 (R. 12). Neither the District Court nor any of its judges was named as appellee or as a party.

On March 1, 1950, the District Court and its judges filed a motion in the Court of Appeals to be made parties, for leave to intervene, for hearing, and for leave to present oral argument and file a written brief (R. 13-15). This motion was denied on June 8, 1950 (per Circuit Judges Clark, Wilbur K. Miller, and Prettyman) (R. 15-16).

Thereafter, in October 1950, the Solicitor General, as *amicus curiae,* applied for leave to file a motion and suggestion that respondent's appeal be dismissed for lack of jurisdiction (R. 16), and attached a copy of the proposed motion and suggestion (R. 17-18). On October 9, 1950, at the oral argument of the *ex parte* appeal, the Court of Appeals granted the Solicitor General's application for leave to file and directed the clerk to file the Solicitor General's motion and suggestion that the appeal be dismissed (R. 19). After the argu-

ment, the Solicitor General was granted leave to file a brief *amicus curiae* (R. 20), and such a brief was filed.

On January 18, 1951, the Court of Appeals (Circuit Judges Edgerton and Clark, Prettyman, J., dissenting) handed down its opinion and judgment reversing the District Court (R. 20-35). The majority opinion held that all applicants for bonding-business authorizations, initial or renewal, are entitled to demand a full-scale judicial hearing as of right, to be informed of "all data upon which a decision is to be based," and to be given opportunity to confront and cross-examine all persons making charges against them (R. 23). The opinion also indicated that the same rules would govern applicants for admission to the bar (R. 22-23).

On February 2, 1951, within the time established by the Court of Appeals for filing a petition for reconsideration of the January 18th judgment, the District Court and its judges again moved to be made parties and to have leave to intervene in the proceedings, and also moved for leave to file a petition for rehearing *in banc* and for a hearing *in banc* (R. 36-39). On the same day, the Solicitor General, as *amicus curiae,* moved for leave to file a petition for rehearing *in banc* (R. 39-40). A petition for rehearing *in banc* was attached to these motions (R. 40-41).

On March 30, 1951, the Court of Appeals *in banc* denied, after consideration, the District Court's

motion,[3] and granted the Solicitor General's motion as *amicus curiae* (R. 41). The court *in banc* also granted the petition for a rehearing *in banc* (R. 42). The rehearing *in banc* was held on April 30, 1951, and the Solicitor General appeared as *amicus curiae*.[4]

On July 20, 1951, the full Court of Appeals entered its judgment reversing the District Court and remanding the case for further proceedings not inconsistent with the original decision of January 18, 1951 (R. 50). There was, however, no majority opinion. Judges Edgerton and Bazelon announced that they adhered to the January 18th opinion filed by the majority of the division of three judges (R. 43-44). Judge Fahy noted his concurrence in the result of the earlier opinion but did not further elaborate his views (R. 43). Judge Miller concurred in the result of that opinion on the ground that an applicant for a renewal authorization—but not an initial applicant—is entitled to a judicial hearing (R. 44-49). Chief Judge Stephens, and Judges Prettyman and Proctor, adhered to the views expressed in Judge Prettyman's dissent to the original opinion and decision of the court (R. 50).

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[3] Judges Edgerton, Fahy, and Bazelon later announced that they were of the view that the District Court's motion should have been granted (R. 43).

[4] Circuit Judges Clark and Washington did not participate in the rehearing (R. 50).

REASONS FOR GRANTING THE WRIT

I

By a closely divided vote, the full Court of Appeals for the District of Columbia Circuit has now held—contrary to that court's previous statements (*In re Carter*, 177 F. 2d 75, 76-78, certiorari denied, 338 U. S. 900)—that applicants for renewal of bonding-business applications are entitled to a complete judicial hearing before their applications can be denied. Certain of the judges of the Court of Appeals have also announced the view that initial applicants can demand the same treatment. The result is a direct conflict between the long-established practice and views of the District Court, charged by Congress with administering the District of Columbia bondsman statute, and the newly announced views of the majority of the court below, on an important matter affecting the proper administration of criminal justice in the District of Columbia. As the final authority, by mandate of Congress, in all justiciable matters of judicial administration in the District of Columbia, this Court should definitively resolve the conflict and reestablish the system of licensing bail-bondsmen in the District on the footing Congress intended. However reluctant the Court may ordinarily be to take cases presenting issues of local law the unusual character of the present controversy and the nature of the questions presented justify the granting of the writ. For not only is the matter of great im-

portance to the District,[5] but the majority holding below has far-reaching constitutional implications for all types of term-licensing systems, throughout the nation. It is plain that the controversy has now far outstripped the significance it had at the earlier stage when only the matter of revocation during the term of the license was before this Court, and the Court of Appeals had definitely indicated that initial and renewal applications were not on the same plane as revocations. *In re Carter,* 177 F. 2d 75, certiorari denied, 338 U. S. 900, No. 422, Oct. Term, 1949.

II

The District Court had full authority to deny respondent's renewal application without a hearing and on the basis of all the information available to it.

A. Spurred by certain well-known scandals connected with the professional bonding-business in the District of Columbia courts, Congress passed the Act of March 3, 1933 (47 Stat. 1482, c. 206, Title 23, c. 6, of the District of Columbia Code) to regulate that occupation and provide for its supervision. The business was declared to be "impressed

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[5] Cf. for cases reviewing matters peculiar to the District of Columbia, *Aldridge* v. *United States,* 283 U. S. 308; *Reed* v. *Allen,* 286 U. S. 191; *Best* v. *District of Columbia,* 291 U. S. 411; *Washington Fidelity Ins. Co.* v. *Burton,* 287 U. S. 97; *Loughran* v. *Loughran,* 292 U. S. 216; *District of Columbia* v. *Murphy,* 314 U. S. 411; *District of Columbia* v. *Pace,* 320 U. S. 698.

with a public interest" (Section 2, Sec. 23-602 D. C. Code), strict rules were laid down for the conduct of a bondsman's activities and his relations with prisoners and attorneys (Sections 3-7, Secs. 23-603 —23-607), and the criminal courts were entrusted with the qualifications, authorization, and supervision of the carrying-on of the bonding-business (Sections 8, 12, Sec. 23-608, 23-612). It was made the duty of the criminal courts (a) to provide reasonable rules and regulations for the qualifications of bondsmen and the terms and conditions upon which such business was to be carried on, (b) to authorize persons to engage in the bonding-business, and in doing so to "take into consideration both the financial responsibility and the moral qualities" of the applicant, and (c) to renew from time to time the authorizations of persons engaging in the bonding-business (Section 8, Sec. 23-608). It was also expressly made the statutory duty of the criminal courts to see that the provisions of the Act are enforced (Section 12, Sec. 23-612).[6]

These provisions, and the entire structure of the bonding-business act, make it clear that the granting or denial by the District Court of an initial or renewal application to engage in the bonding-busi-

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[6] Section 12 (Sec. 23-612) likewise provides that "upon the impaneling of each grand jury in the District of the United States for the District of Columbia it shall be the duty of the judge impaneling said jury to give it in charge to the jury to investigate the manner in which this chapter [i.e., the Act of March 3, 1933] is enforced and all violations thereof."

ness in that court pertains solely to the court's administrative and non-judicial functions. Because of the intimate connection of professional bondsmen with the proper administration of criminal justice, Congress entrusted the criminal courts with the task of overseeing their qualifications, good conduct, and business activities, and strongly emphasized its purpose to impose administrative and non-judicial duties on these courts by specifically making it their duty "to see that this Act is enforced" (Section 12, Sec. 23-612), a requirement peculiarly appropriate to the execution of administrative functions.[7] As the Committee reports state: "Specifically, the intent of the proposed legislation is to give the courts of the District of Columbia power to weed out undesirable persons engaged in the business of executing criminal bonds; to punish unethical collusion between bondsmen, attorneys, and the police; and, in general, to promulgate such rules and regulations as shall be conducive to protecting the public and the courts against unscrupulous bondsmen." S. Rep. No. 832, 72d Cong., 1st Sess., p. 1; H. Rep. No. 2171, 72d Cong., 2d Sess., p. 1.

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[7] Congress may, of course, confer purely administrative powers on the District Court for the District of Columbia. *Butterworth* v. *Hoe*, 112 U. S. 50; *Baldwin Co.* v. *Howard Co.*, 256 U. S. 35; *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 442-443; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693; *National Mutual Ins. Co.* v. *Tidewater Transfer Co., Inc.*, 337 U. S. 582, 616, 638-639.

Pursuant to this direction, and in performance of these administrative duties imposed upon it, the District Court adopted Rules which limit bonding-business licenses to two years and require an applicant for a renewal of authorization to present the same information and fulfill the same requirements as an applicant for an initial license (Rule III, *infra,* pp. 31-32). The present case arises out of an appeal taken from an order refusing to grant such a renewal application because, in the District Court's view, the applicant did not satisfy the requirements established by the Act and by the Rules. The majority of the court below, rejecting the established views of the District Court, has now held that such a denial cannot be made without a full judicial-type hearing.

B. It follows, however, from the administrative, non-judicial character of the District Court's action in granting or denying bonding-business applications, that that court has the right and power to exercise its informed judgment and discretion, and its decisions cannot be overturned (if at all) unless they are shown, by affirmative proof, to be arbitrary, capricious, or an abuse of the discretion entrusted to the court. Cf. *Tulman* v. *Committee on Admissions and Grievances,* 135 F. 2d 268 (C. A. D. C.); *Carver* v. *Clephane,* 137 F. 2d 685 (C. A. D. C.). The District Court is also empowered, in passing upon such applications, to consider (and it has always considered) all available rele-

vant information, including confidential material—just as it does in passing upon applications for admission to the bar, in appointing court clerks, United States Commissioners, assignment and motion commissioners, other court officials, referees in bankruptcy, special masters, or members of the Board of Education for the District of Columbia, as well as in sentencing prisoners on the basis of non-public probation reports (cf. *Williams* v. *New York,* 337 U. S. 241).

The bondsman statute, like the other acts giving appointment power to the District Court, does not expressly require any hearing (Sec. 23-608), and we believe that none is implied by the Act or imposed by the Constitution. Since the Act was passed in 1933, authorizations have been made without hearing on the basis of private information. The genesis of the Act, as well as its detailed provisions, indicate that Congress' prime purpose was to remove the bonding-business sharply away from any connection with crime or criminal activities. To achieve that significant end, the District of Columbia courts were expressly given "power to weed out undesirable persons" and to protect "the public and the courts against unscrupulous bondsmen." *Supra,* p. 12. And current history underlines the importance of the role played by bondsmen in the administration of American criminal justice.[8]

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[8] A bondsman does more than put up money to be forfeited if the defendant absconds. It is his obligation to secure, as far

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Thus, the criminal courts have a direct and significant mandate from Congress to be especially alert to prevent persons tainted with unsavory connections from becoming professional bondsmen. This can only be done, once reason to make inquiry appears, by collating and securing all pertinent information, much of it necessarily confidential and unavailable for public disclosure. If a hearing were required, and all this material were compelled to be presented to the applicant, the sources of information would dry up, for obvious reasons, and the District Court would be unable satisfactorily to fulfill its duty of keeping the bonding-business untainted. See Prettyman, J., dissenting below (R. 27-28, 33).[9] Just as Congress has, for the country's

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as possible, compliance by the bonded defendant with orders to appear, and he is responsible for the defendant's appearance. *Reese* v. *United States*, 9 Wall. 13, 21; *Taylor* v. *Taintor*, 16 Wall. 366, 371; *Cosgrove* v. *Winney*, 174 U. S. 64; *Concord Casualty & Surety Co.* v. *United States*, 69 F. 2d 78, 81 (C.A. 2); *United States* v. *Lee*, 170 Fed. 613 (S. D. Ohio). Cf. 18 U. S. C. 3142. These cases also point out the wide discretion of the court or commissioner in accepting or rejecting a bondsman. See R. 25-26.

[9] In *Williams* v. *New York*, 337 U. S. 241, this Court held that a criminal trial judge could constitutionally disregard a jury's recommendation of life imprisonment in a murder case, and impose the death penalty, on the basis of information acquired by him through probation reports (and other sources) which were not made available to the defendant. The Court said: "We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to

protection, empowered the Attorney General to bar aliens, during time of war, on the basis of confidential information and without a hearing (*Knauff* v. *Shaughnessy,* 338 U. S. 537, 540-541, 543-544), so, in another sphere, the bondsman statute authorizes the District Court to protect the public and the courts by scrutinizing and probing bondsman applications without revealing the sources of its information. In both cases, it has been determined by the agency to which Congress has committed the matter that an open hearing would be detrimental to the very public interest which Congress has emphatically declared should be protected.

In this respect, the bonding-business differs sharply from the learned professions, such as law and accountancy, and from other occupations requiring study, preparation, and experience.[10] Not only is the bonding-business an occupation which requires no special training or knowledge, but experience has shown, as Congress noted (76 Cong. Rec. 174, 5424; see also, *supra,* p. 12), that the business is very much subject, if unsupervised, to

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cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination." 337 U. S. at 250. See also *Solesbee* v. *Balkcom,* 339 U. S. 9.

[10] Applicants for, or holders of, professional licenses have always been accorded a special status. Cf. *Ex parte Robinson,* 86 U. S. 505, 512; *Goldsmith* v. *Board of Tax Appeals,* 270 U. S. 117, 123.

grave abuses, unethical practices, collusion with criminals, and other injuries to criminal justice.[11] With licensed occupations in this category—characterized by their historic potentiality for infliction of serious public injury—it is important that the licensing agency have the widest freedom. Accordingly, the trend of the decisions has been that notice and hearing cannot be demanded unless the statute clearly imposes that requirement. See Note (1927) 4 Wis. L. Rev. 180, 186; Note (1941) 20 Neb. L. Rev. 24, 33-34; (1945) 45 Col. L. Rev. 67, 68-69.[12]

This principle is doubly applicable to the bonding-business. For the pressing need to exclude all persons with criminal or unsavory connections makes it especially important to permit denials of licenses on the basis of confidential information and without a hearing. And the same result is re-

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[11] On the regulation of the bonding-business, see *McDonough* v. *Goodcell*, 13 Cal. 2d 741, 91 P. 2d 1035, 123 A. L. R. 1205, and Note: *Validity, construction, and application of statutes regulating bail bond business*, 123 A. L. R. 1215.

[12] See, e.g., *Wallace* v. *Mayor*, 27 Nev. 71, 73 Pac. 528 (liquor dealer); *Bungalow Amusement Co.* v. *Seattle*, 148 Wash. 485, 489-493, 269 Pac. 1043, 1044-1046 (dance hall); *Mehlos* v. *Milwaukee*, 156 Wis. 591, 607, 146 N. W. 882, 887-8 (dance hall); *Commonwealth* v. *Kinsley*, 133 Mass. 578, 579 (pool room); *Darling Apt. Co.* v. *Springer*, 22 A. 2d 397, 401 (Del.) (liquor dealer); *People ex rel. Ritter* v. *Wallace*, 160 App. Div. 787, 789, 145 N. Y. Supp. 1041, 1042 (dance hall); *People ex rel. Lodes* v. *Dept. of Health*, 189 N. Y. 187, 190-191, 193-194, 82 N. E. 187, 188-189 (milk dealer); *State ex rel. Nowotny* v. *Milwaukee*, 140 Wis. 38, 121 N. W. 658; *La Plante* v. *State Board*, 47 R. I. 258, 131 Atl. 641 (auto driver's license).

quired by the integral relation of the bonding-business to the courts, which are themselves the license-granting authorities. Courts should have the widest powers to insure that their officers, employees, and agents are properly qualified, and free from all taint. The privilege of becoming a bondsman should be subject and subordinate to the primary right and duty of the court to preserve the justice and fairness of all its processes.

C. The District Court's authority in passing upon a renewal application, such as respondent's, is the same as on an initial application. Neither the statute, nor the Rule, nor the Constitution requires otherwise.

The statute not only authorizes the criminal courts to prescribe the terms and conditions upon which the bonding-business shall be carried on, but it also expressly requires the courts to pass anew upon the bondsman's authority "from time to time at such periods as the court may by rule provide." *Infra,* p. 31. Thus, the Act goes further than merely to grant authority for periodic renewals; it requires regular reexamination and requalification of bondsmen. Judge Miller, below, stresses the further requirement that "before said authority shall be renewed the court shall require from each of said persons an affidavit that since his previous qualification to engage in the bonding business he has abided by the provisions of this chapter" (*infra,* p. 31), and

seems to imply that this provision indicates that, on renewal, the court is to concern itself mainly or solely with events transpiring since the original application was granted (R. 49). But it is clear that this clause of the statute is directly related to the prior provision requiring—at the time the original application is approved—an affidavit from "each person employed by said bondsman as agent, clerk, or representative in the bonding business * * * stating that said person will abide by the terms and provisions of this chapter." *Infra,* p. 31. Both affidavit requirements are *additional* requirements, mainly directed toward control of the bondsman's employees, and they were not designed as substitutes—either at the time of initial application or on renewal—for the plenary inquiry into the applicant's character, financial responsibility, and qualifications to be a bondsman.[13]

The court Rule specifically requires the renewal application to be in the same form as the initial one, and contemplates the same procedure. See Appendix, *infra,* pp. 31-32. The Rule does not restrict, explicitly or implicitly, the power of the court to deny a renewal application on any ground on which a denial of an original application might be based. And the District Court has treated renewal applications in the same way, and as subject to the same scrutiny, as initial ones. It has, moreover, not considered itself barred from evaluating the bonds-

[13] The Act expressly makes anyone swearing falsely to these affidavits guilty of perjury.

man's qualifications in the light of information coming to its attention after a prior approval. Such a prior authorization does not irrevocably stamp the applicant as fully qualified, or foreclose later inquiry if that be thought desirable.

Nor does anything in the Constitution prescribe that an applicant for a renewal license must be treated differently from an original applicant. It is clear from the statute and the Rule that every bondsman holds his license only for a given term. In the case of the District Court this is two years; but it might be for one year (as the Municipal Court provides: see Rules Regulating Practice before the Criminal Division of the Municipal Court, Rule 3(c)), or six months, or every month, or any period the court might determine. The requirement of periodic relicensing warns every bondsman that his license is temporary, and may not be renewed, and there is no promise or representation that the renewal will be granted, no matter how often or how infrequently he is required to make application. Whatever "property right" is originally awarded is stamped at the outset with a definite time limit, and the applicant has full notice of its duration.[14]

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[14] In the first *Carter* case, 177 F. 2d 75, certiorari denied, 338 U. S. 900, the court below held that *during its term* a bonding-business authorization was a vested right which could not be taken away without a due process hearing. It stated, however, that this was not true of initial or renewal applications. 177 F. 2d, at 76-8. The majority of the court below has now rejected these remarks as *obiter* (R. 22, 24, 46-47).

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In the light both of this temporary character of the privilege and of the nature of the business, there is every valid reason to refuse to imply from the Constitution (or the statute itself) a special status for renewals. In comparable circumstances, courts have held that renewals may be denied without a hearing. *Matter of Cohen,* 291 N.Y. 558, 50 N. E. 2d 658; *State* v. *Conragan,* 58 R. I. 313, 320-321, 192 Atl. 752, 755-6; *Pierstorff* v. *Board of Embalmers,* 68 Ohio App. 453, 455, 41 N. E. 2d 889, 890; see also cases cited in footnote 12, *supra,* p. 17. So far as we are aware, only the Supreme Court of Iowa has held to the contrary. *Gilchrist* v. *Bierring,* 234 Iowa 899, 14 N. W. 2d 724; *State ex rel. Bierring* v. *Swearingen,* 22 N. W. 2d 809 (Iowa). And, unlike the bonding-business, the occupations involved in those cases—operation of a school of cosmetology and barbering—are not prone to criminal or unlawful connections, nor do they concern the administration of justice, and the holding of open hearings would not be detrimental to any public interest.[15]

III

The Court of Appeals also erred in entertaining the purported direct appeal from the administra-

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[15] The Iowa court stressed the facts that operation of a cosmetology school was in no way "inherently inimical to the public welfare," that a substantial investment was made by the licensee, and that considerable time and study was necessary in preparation. 234 Iowa, at 914-5, 14 N. W. 2d, at 732.

tive, non-judicial order of the District Court denying respondent's renewal application.

A. It is another corollary of the administrative character of the District Court's action in passing upon bonding-business applications, initial or renewal, that its orders are not *appealable* to the court below. The bondsman statute does not itself provide, either expressly or by implication, for any appellate review, and respondent must rely on the general appeal provisions of 28 U.S.C. 1291. But it is plain that this section (as well as its predecessor in the Judicial Code, and the former Section 17-101 of the D. C. Code) governs only *judicial* decisions, and was not designed to cover a district court's administrative orders such as that involved here. Whether or not the bondsman statute or the Constitution requires a hearing before denial of a renewal application (*supra,* pp. 10-21), the District Court's action in passing upon the application is administrative—and not judicial—and therefore non-appealable.

This conclusion is required by the established principles of appellate review which are best illustrated, for present purposes, by examples from state jurisprudence. For in many states of the Union the legislature has imposed various administrative duties, akin to that with which we are now concerned, upon the lower courts; and the case reports of these states provide forceful analogies for the conclusion that Section 1291 does not open the doors of the Court of Appeals to appeals

from non-judicial administrative orders issued by the District Court. In these states, the attempt has frequently been made to seek review of such administrative orders in the higher courts through general appeal provisions comparable to Section 1291, only to meet with rejection on the ground that these general review statutes are limited to the judicial orders or decrees of the lower courts. For instance, appeals or writs of error have been held unavailable to review an order setting the compensation to be paid an assistant district attorney (*City of Roanoke* v. *Smith,* 164 Va. 65, 178 S. E. 676); an order appointing a labor arbitrator (*Fox River Paper Co.* v. *International Brotherhood,* 242 Wis. 113, 7 N. W. 2d 413); or an umpire for an insurance arbitration (*Philadelphia Underwriters* v. *Folds,* 156 Ga. 773, 120 S. E. 102); an order authorizing the state banking superintendent to sell the assets of a liquidated bank (*Cochran* v. *Bennett,* 37 Ga. App. 202, 139 S. E. 428)[16]; a court determination that sufficient voters had approved the adoption of the city-manager plan of government (*City of Roanoke* v. *Elliott,* 123 Va. 393, 407-413, 96 S. E. 819, 824-826); the decision of a court sitting as a board to canvass state elections (*State* v. *Harrington,* 3 Terry 14 (Del.), 27 A. 2d 67, 75); an order directing the issuance of a certifi-

[16] See also *Dugger* v. *Cox,* 110 F. 2d 834, 836 (C.A. 6) (and other similar cases) holding unreviewable a federal district court's order approving the sale of the assets of an insolvent national bank.

cate of incorporation to a municipality or private corporation (*West* v. *West Va. Fair Assn.*, 97 W. Va. 10, 125 S. E. 353; *Gas-Light Co. of Augusta* v. *West*, 78 Ga. 318); or a court order declaring a certain county office vacant (*Davis* v. *Forrester*, 188 Ga. 73, 2 S. E. 2d 601).

These are all instances in which a legislature has seen fit, as here, to entrust a lower court with certain administrative, non-judicial duties, and the pervading principle of the cases is that in such circumstances the normal appeal provisions applicable to truly judicial proceedings are not available. In the light of this principle, 28 U.S.C. 1291 does not afford any rights or remedy to respondent, and his appeal—which was necessarily premised on that provision—should have been dismissed outright.

In re Summers, 325 U.S. 561—upon which reliance was placed below (R. 22; cf. R. 32-33, 45-46) —does not suggest the contrary. The Court there held, on petitioner's claim that his religious freedom had been infringed by an order of the Supreme Court of Illinois denying his application for admission to the bar, that it had jurisdiction of the case, even though the state court's order was a "ministerial" and not a "judicial" act under the law of Illinois. But that was because this Court has power, when a constitutional issue is raised, to appraise the state court's action for itself, and on that basis it concluded that for federal constitutional purposes the Illinois

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court's action was a "judicial order" (325 U.S. at 569), regardless of what it may have been under the state's own legal system. 325 U.S., at 566-569. Cf. *Randall* v. *Brigham,* 7 Wall. 523, 535 ("Both the admission and the removal of attorneys are judicial acts.")

B. We are very doubtful whether the granting or denial of an application to become a bondsman is reviewable in any form by an appellate court. Congress has specifically placed the full duty of enforcement of the professional bondsman statute on the criminal divisions of the District Court (Section 12, Sec. 23-612), and has provided for the criminal divisions of that court to appoint, regulate, and supervise the conduct of the bonding business insofar as that court is concerned. As noted above (*supra,* pp. 11-12, 14-16), the statute thus recognizes the close relationship between the proper performance of bonding functions and the fair and efficient administration of criminal justice which is the responsibility of a criminal trial court. Because of this intimate connection, the Act has made the regulation of bonding activities an integral part of the administrative business of the District Court.[17] And the conduct of that court's administrative business—whether it be the appointment of court clerks, commissioners, members

[17] As well as of the Municipal Court (formerly the police court) and the juvenile court—the other criminal courts in the District of Columbia.

of the Board of Education, or the promulgation of practice rules, or the qualification of bondsmen conducting business in that court—is normally not a matter for any review or supervision by other tribunals.

If, however, the petitioners' action on an application to engage in the bonding-business, original or renewal, is subject to any judicial scrutiny, it must be through a proper proceeding in the nature of mandamus or for a mandatory injunction, in which the applicant alleges and proves arbitrary or capricious action or a gross abuse of discretion, and in which the petitioners are parties and can avail themselves of the right to present a response and to be heard. In such an orderly proceeding, the tribunal to whom the petition for mandatory relief is addressed has the benefit of the views and evidence offered by the District Court and its judges, and a full adversary record, properly prepared and made up, is available for the deciding tribunal. This is the only procedure which can properly be followed in all reviewable bonding-business matters, since Congress has provided no other special method of review.[18] Hitherto, the

[18] Title 2 of the District of Columbia Code contains several chapters dealing with the licensing, by various boards and commissions, of certain professions and occupations (*e.g.*, medicine, healing arts, dentistry, optometry, nursing, veterinary medicine, pharmacy). In some cases, on denial of an application for a license Congress has *specifically* provided for an appeal or other method of judicial review, *e.g.*, sec. 2-129

Court of Appeals has generally followed this practice in reviewing license denials. *E.g., Hammond* v. *Hull,* 131 F. 2d 23, certiorari denied, 318 U. S. 777; *Thomas* v. *Vinson,* 153 F. 2d 636; *Edgerton* v. *Kingsland,* 168 F. 2d 128; *Carver* v. *Clephane,* 137 F. 2d 685; cf. *Tulman* v. *Committee on Admissions and Grievances,* 135 F. 2d 268.

IV

Despite petitioners' direct interest, conferred by statute, in the granting and denial of bonding-business permits, the Court of Appeals not only recognized an appeal which did not name petitioners (or any other person) as appellees or adverse parties,

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(healing art—review by certiorari in District Court); sec. 2-1110 (barbers—review by appeal to District Court); sec. 2-406 (nurses—review by certiorari); sec. 2-606 (renewal of license to sell poisons—review in Court of Appeals). In other instances, Congress has made no provision at all for judicial review on denial of a license (*e.g.*, sec. 2-309, dentistry; sec. 2-516, optometry), or has expressly made the administrative determination "final and binding" (sec. 2-806, veterinarians); in these cases, the only method of judicial review, if any, would appear to be by way of mandamus. With respect to revocation or suspension of a license, the chapters of Title 2 generally provide, in specific terms, for some type of judicial review (*e.g.*, sec. 2-123, healing art; sec. 2-407, nurses; sec. 2-810, veterinarians).

We think that a comparison of these various provisions of Title 2 with those of the professional bondsman statute shows that when Congress has desired to provide an appeal or other direct method of judicial review from the refusal or revocation of a license, it has so specified in the particular statute, and that in the absence of such an express provision the only remedy, if any, is by way of mandamus.

but also twice refused petitioners the right to intervene and participate in the appellate proceedings in defense of their statutory interests (R. 13-16, 36-39, 41). As we have pointed out (*supra,* pp. 10-12), in matters governed by the bondsman statute the District Court and its judges act administratively—as an administrative agency comparable, in its field, to the Interstate Commerce Commission or the Securities and Exchange Commission—and they are at least equally entitled to be heard when their orders are attacked. Cf. *Interstate Commerce Commission* v. *Oregon-Washington Rd. & Nav. Co.,* 288 U.S. 14; *Securities and Exchange Commission* v. *U. S. Realty Co.,* 310 U.S. 434, 458 *ff.* There is no one else who can perform this function. For a court to entertain a challenge to an administrative order without hearing the tribunal which issued the order, or at least some other person directly interested in sustaining the order, is a non-adversary *ex parte* procedure unknown to our law. Arguments by an *amicus curiae,* though they may be helpful, are no substitute for participation by persons directly interested in the cause. The District Court and its judges should clearly have been permitted to participate in the proceeding seeking review of their orders. By like token, they have standing to present this petition for a writ of certiorari. If this were not so, there would be no method, and no person capable, of seeking

correction by this Court of the Court of Appeals' errors.[19]

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST, 1951.

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[19] Three of the seven participating judges of the court below thought that petitioners should have been permitted to intervene. *Supra,* p. 8.

APPENDIX

1. The pertinent portions of the Act of March 3, 1933, 47 Stat. 1482, ch. 206 (as contained in the District of Columbia Code) are as follows:

§ 23-602 (Section 2). *Business impressed with public interest.*

The business of becoming surety for compensation upon bonds in criminal cases in the District of Columbia is impressed with a public interest.

* * * * * *

§ 23-608 (Section 8). *Qualifications of bondsman—Rules to be prescribed by courts—List of agents to be furnished—Renewal of authority to act.*

It shall be the duty of the police court, juvenile court, and the criminal divisions of the District Court of the United States for the District of Columbia, each to provide, under reasonable rules and regulations, the qualifications of persons and corporations applying for authority to engage in the bonding business in criminal cases in the District of Columbia, and the terms and conditions upon which such business shall be carried on, and no person or corporation shall either as principal, or as agent, clerk, or representative of another, engage in the bonding business in any such court until he shall by order of the court be authorized to do so. Such courts, in making such rules and regulations, and in granting authority to persons to engage in the bonding business, shall take into consideration both the financial responsibility and the moral qualities of the person so applying, and no person shall be permitted to engage, either as principal or agent, in the business of becoming surety upon bonds for compensation in criminal cases, who

has ever been convicted of any offense involving moral turpitude, or who is not known to be a person of good moral character. It shall be the duty of each of said courts to require every person qualifying to engage in the bonding business as principal to file with said court a list showing the name, age, and residence of each person employed by said bondsman as agent, clerk, or representative in the bonding business, and require an affidavit from each of said persons stating that said person will abide by the terms and provisions of this chapter. Each of said courts shall require the authority of each of said persons to be renewed from time to time at such periods as the court may by rule provide, and before said authority shall be renewed the court shall require from each of said persons an affidavit that since his previous qualification to engage in the bonding business he has abided by the provisions of this chapter, and any person swearing falsely in any of said affidavits shall be guilty of perjury.

* * * * * *

§ 23-612 (Section 12). *Enforcement.*

It shall be the duty of the police court, juvenile court, and of the criminal divisions of the District Court of the United States for the District of Columbia to see that this chapter is enforced, and upon the impaneling of each grand jury in the District Court of the United States for the District of Columbia it shall be the duty of the judge impaneling said jury to give it in charge to the jury to investigate the manner in which this chapter is enforced and all violations thereof.

2. Rule III of the District Court rules pertaining to bonding-business applications provided as follows:

An application containing like statements shall be filed by each individual authorized bondsman desiring to continue in said business every second year thereafter on the anniversary of the Court's approval of the original application, which application must also receive the approval of a Justice of this Court before the bondsman shall be entitled to continue to appear as surety on bonds or recognizances in this Court.[1]

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[1] Effective July 1, 1951, the District Court adopted new bonding-business rules. Rule 2 of the new rules pertains to renewal applications. It provides:

> 2. An application containing like statements [i.e., statements like those required to be included in initial applications] shall be filed by each individual authorized bondsman desiring to continue in said business every second year thereafter, at least 30 days before the anniversary of the Court's approval of the original application, which application must also receive the approval of a Judge of this Court before the bondsman shall be entitled to continue to appear as surety on bonds or recognizances in this Court.

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